



1 restaurant. TA Operating leases out part of these facilities.  
2 Sierra 76, the originally named defendant in this action, for  
3 example, leases the casino. TA Operating runs the restaurant.

4 Mr. Brown worked for the restaurant on the premises, and he  
5 alleges that his former manager discriminated against him based on  
6 his race. He filed a complaint with the Nevada Equal Rights  
7 Commission ("NERC"). The NERC found that Mr. Brown was  
8 discriminated against and issued him a right to sue letter.

9 Prior to filing his federal complaint, Mr. Brown's counsel, Mr.  
10 Jeffrey Blanck, contacted the city of Sparks to determine the  
11 identity of the resident agent for the business operating at the  
12 address of 200 West McCarran, which was Mr. Brown's employment  
13 address. "Someone" apparently informed Mr. Blanck that the business  
14 license for that address was Sierra 76, Inc., dba Sierra Sid's.  
15 (See P.'s Opp. 2, 3 (#19).) Mr. Blanck did not determine whether  
16 there was more than one business license for that address. As it  
17 turns out, both Sierra 76 and TA Operating have 200 West McCarran  
18 listed as their address on their business licenses. (D.'s Mtn. Exs.  
19 8, 9 (#18-2).)

20 Mr. Brown filed suit in federal court against Sierra 76, Inc.,  
21 on July 9, 2007. Mr. Brown's proposed summons (#4) issued on July  
22 9, 2007, but was never returned. On November 20, 2007, the Clerk of  
23 Court filed a Notice (#6) of Intent to Dismiss Pursuant to Federal  
24 Rule of Civil Procedure 4(m). In response, on November 26, 2007,  
25 Mr. Brown filed an Affidavit (#7) of Brent Pierce, which indicated  
26 that personal service had been effected on Sierra 76's registered  
27 agent on July 16, 2007.

1 Sierra 76 did not file an answer or otherwise respond to Mr.  
2 Brown's complaint. The clerk of court entered default (#10) as to  
3 Sierra 76 on December 28, 2007. The Court held a hearing on the  
4 entry of default on January 22, 2008, and default judgment was  
5 entered (#17) against Sierra 76 on February 1, 2008.

6 Sierra 76 contends that it told Mr. Brown that he had named the  
7 wrong defendant in his original complaint. Ms. Marcy Barba, the  
8 president of Sierra 76, asserts by way of affidavit that she  
9 initially contacted Mr. Blanck shortly after July 19, 2007, and  
10 informed him that Sierra 76 was the wrong defendant in Mr. Brown's  
11 case. Mr. Blanck denies that Ms. Barba ever contacted him before  
12 February 20, 2008, when she called him to discuss the default  
13 judgment that had been entered.

14 Ms. Barba also states that "very shortly [after July 19, 2007,]  
15 I contacted TA Operating regarding the Plaintiff's complaint and  
16 [told TA Operating] that Plaintiff had sued the wrong entity. At  
17 that time, I was assured by TA Operating that TA Operating would  
18 respond to the allegations in the complaint." Moreover, she "spoke  
19 personally with an employee of TA Operating [in 2007] who informed  
20 me that Sylvester Brown . . . had filed charges of employment  
21 discrimination against TA Operating with the [EEOC] regarding his  
22 employment with TA Operating." Ms. Barba was then "informed" by TA  
23 Operating that it "had responded to the Plaintiff's charges and that  
24 the EEOC had found against TA Operating."

25 After the entry of default judgment, Sierra 76 filed a motion  
26 (#18) to set aside the default on June 12, 2008. The Court granted  
27 (#21) the motion (#18) on October 20, 2008, but granted the  
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1 plaintiff leave to file an amended complaint. Mr. Brown filed his  
2 amended complaint (#24) on November 7, 2008, this time naming "TA  
3 Operating LLC, dba Travel Centers of America" as a defendant. A  
4 summons was issued (#26) as to TA Operating's registered agent on  
5 November 14, 2008.

6 TA Operating filed the present motion to dismiss (#32) on  
7 December 22, 2008. TA Operating contends that Mr. Brown's amended  
8 complaint is time-barred. Mr. Brown argues that his amended  
9 complaint relates back to his original complaint and thus is not  
10 time-barred.

## 11 12 **II. Amendment under Rule 15**

13 Rule 15 governs when an amendment to a pleading relates back to  
14 the date of the original pleading. The test for when an amendment  
15 relates back when a new party is added to the action is more  
16 stringent than that for relating back to add a new claim. Union  
17 Pac. R.R. Co. v. Nev. Power Co., 950 F.2d 1429, 1432 (9th Cir. 1991)  
18 ("Amendments seeking to add claims are to be granted more freely  
19 than amendments adding parties."). Under Rule 15, when adding a new  
20 party, the amendment relates back if (1) the amendment asserts a  
21 claim or defense that arose out of the same conduct, transaction or  
22 occurrence set out in the original pleading, (2) the party to be  
23 added received notice of the action such that it will not be  
24 prejudiced in defending on the merits, (3) "the party to be added  
25 knew or should have known that the action would have been brought  
26 against it[] but for a mistake concerning the proper party's  
27 identity," and (4) the notice and knowledge elements must have been

1 satisfied within 120 days of the filing of the suit. FED. R. CIV. P.  
2 15(c); Louisiana-Pacific Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th  
3 Cir. 1993); see FED. R. CIV. P. 4(m).

4 Here, the requirements are met for amending a complaint to add  
5 a new party, and the amended complaint relates back to the date of  
6 the timely filed original complaint. First, Mr. Brown's amended  
7 complaint arises from the same conduct set out in the original  
8 pleading; TA Operating does not dispute this.

9 Second, TA Operating received notice of the action such that it  
10 will not be prejudiced in defending the case on the merits. For  
11 purposes of the rule, "notice" may either be formal or informal.  
12 Honeycutt v. Long, 861 F.2d 1346, 1350 (5th Cir. 1988); JAMES WM.  
13 MOORE, 3 FEDERAL PRACTICE § 15.19[3][c] (3d. ed. 2009) (collecting  
14 cases). The notice, however, must be sufficient such that the new  
15 party is not prejudiced in maintaining a defense. FED. R. CIV. P.  
16 15(c)(1)(C)(i). Actual notice of the complaint is not required, but  
17 the added party must have been "made aware of the issues in the  
18 complaint." 3 FEDERAL PRACTICE § 15.19[3][c]. But cf. Cooper v. U.S.  
19 Postal Serv., 740 F.2d 714, 717 (9th Cir. 1984) (notice of  
20 administrative claim is not sufficient for showing notice of  
21 institution of action).

22 TA Operating had notice of the action. Ms. Barba's affidavit  
23 establishes that she contacted TA Operating "shortly after" July 19,  
24 2007, and was "assured by TA Operating that TA Operating would  
25 respond to the allegations in the complaint." TA Operating does not  
26 dispute that Ms. Barba informed it of the action. Had TA  
27 Operating's only notice of the action been Mr. Brown's EEOC  
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1 complaint, under Cooper, that notice would not have been sufficient.  
2 But here TA Operating received actual notice from a lessee that an  
3 action was pending. TA Operating informed the lessee that it (TA  
4 Operating) knew of the pendency of the action and that it would  
5 respond to the complaint.

6 Further, TA Operating will not be unduly prejudiced in  
7 defending the action. While the case has been pending for almost  
8 two years, TA Operating points to no unique circumstances that show  
9 how it will be prejudiced. Any difficulties in locating witnesses  
10 with knowledge about the events giving rise to this case will be  
11 equally burdensome on both parties.

12 Third, TA Operating either knew or should have known that it  
13 would have been sued but for a mistake of identity. As an initial  
14 matter, there was a mistake of identity here. Mr. Brown's counsel  
15 contacted the City of Sparks and was only informed of one of the  
16 operators of a business license at Sierra Sid's address. He did not  
17 know, however, that more than one business had a business license at  
18 that address. Nor did he discover the mistake after serving the  
19 wrong defendant. Sierra 76, according to Mr. Blanck, never  
20 contacted anyone on the plaintiff's side about the matter.

21 Next, Mr. Brown's mistake appears to stem from confusion  
22 surrounding the corporate structure of TA Operating. In his  
23 original suit, he named "Sierra 76 Inc. dba Travel Centers of  
24 America" as the defendant. His amended complaint seeks to name "TA  
25 Operating dba Travel Centers of America" as the primary defendant.  
26 It is clear that Mr. Brown was familiar with the "dba" designation  
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1 of the defendant; he simply misnamed the proper corporate entity,  
2 which supports his claim that he made a mistake of identity.

3       Also related to this third element is that TA Operating knew –  
4 or at least should have known – of the mistake as it was informed by  
5 Ms. Barba that Sierra 76 was not the proper defendant. TA Operating  
6 even confirmed to Ms. Barba that it knew that it was the proper  
7 defendant in the action when it assured her that it would respond to  
8 the complaint. Thus, Mr. Brown made a mistake as to the identity of  
9 the proper defendant, and TA Operating either knew or should have  
10 known that it would have been sued but for this mistake. Accord  
11 Centuori v. Experian Information Solutions, Inc., 329 F. Supp. 2d  
12 1133, 1139-40 (D. Ariz. 2004) (stating that even if plaintiff  
13 “and/or his counsel might have been negligent, careless, or even  
14 arguably at fault for not naming MIS as the [appropriate defendant,  
15 MIS has] not shown that the failure to name MIS was a strategic  
16 decision and not the result of a mistake concerning identity”).

17       Fourth, the notice and knowledge factors above were satisfied  
18 within the 120 day period set forth by Rule 4(m). Here, the  
19 original complaint was filed on July 9, 2007. Ms. Barba told TA  
20 Operating of the lawsuit “very shortly” after being served sometime  
21 around July 16, 2007. While the exact date is not known, “very  
22 shortly” after July 16, 2007, likely is within 120 days of July 8,  
23 2007.

### 24                                   **III. Conclusion**

25       Mr. Brown did not initially bring TA Operating into the case as  
26 he should have; nevertheless, his amended complaint meets the  
27 requirements of Rule 15, and as such his amended complaint relates  
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1 back to the filing of his original complaint. Therefore, TA  
2 Operating was timely served with the action.

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4 **IT IS HEREBY ORDERED THAT** Defendants' Motion to Dismiss or in  
5 the Alternative for Summary Judgment (#32) is **DENIED**.

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7 DATED: June 24, 2009.

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UNITED STATES DISTRICT JUDGE

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